United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

(with affidavit)

77-2074
77-4136

To be argued by
ROBERT S. GROBAN, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-2074

UNITED STATES OF AMERICA ex rel. DER-RONG CHOUR,
Petitioner,

—v.—

BENEDICT J. FERRO, District Director, Immigration and Naturalization Service, Buffalo, New York, or any other person having the said petitioner in his custody; IMMIGRATION AND NATURALIZATION SERVICE,
Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Docket No. 77-4136

DER-RONG CHOUR,
Petitioner,

—v.—

BENEDICT J. FERRO, District Director, Immigration and Naturalization Service, Buffalo, New York; IMMIGRATION AND NATURALIZATION SERVICE,
Respondents.

ON PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2074

UNITED STATES OF AMERICA ex rel.
DER-RONG CHOUR,

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—v.—

BENEDICT J. FERRO, District Director, Immigration and Naturalization Service, Buffalo, New York, or any other person having the said petitioner in his custody; IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

Docket No. 77-4136

DER-RONG CHOUR,

Petitioner,

—v.—

BENEDICT J. FERRO, District Director, Immigration and Naturalization Service, Buffalo, New York; IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

BRIEF FOR RESPONDENT

Preliminary Statement

These are appeals by Petitioner Der-Rong Chour ("Chour") from orders entered in the United States District Court for the Northern District of New York (Edmund Port, J.) and in the Board of Immigration

Appeals ("Board") (AR 44-5)* which dismissed Chour's contention in both cases that his 1974 deportation proceeding had been unfair because it failed to comply with statutory and constitutional due process requirements.

In No. 77-2074, Chour appeals from a judgment, entered on June 29, 1977 in the United States District Court for the Northern District of New York, which dismissed his petition for a writ of habeas corpus on the ground that the Court lacked subject-matter jurisdiction to consider his claims (AR 37-40). In No. 77-4136 Chour petitions this Court, pursuant to Section 106 of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1105a, to review a final order of the Board, entered on July 14, 1977, which dismissed his appeal from a decision of Immigration Judge Gordon W. Sacks, dated June 27, 1977, that denied Chour's motion to reopen his 1974 deportation proceeding (AR 44-5). These appeals were consolidated by order of this Court, dated July 19, 1977.

It is the Immigration and Naturalization Service's ("Service") position that Chour's appeals should be dismissed because the due process protections accorded Chour in his deportation proceeding satisfied the requirements of the Fifth Amendment and resulted in a fair hearing.

Issues Presented

1. Whether the protections accorded Chour in his deportation proceeding satisfied statutory and constitutional due process requirements and resulted in a fair hearing?

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* References preceded by the letter "AR" refer to the certified administrative record previously filed with this Court for Docket No. 77-4136.

2. Whether the Board of Immigration Appeals abused its discretion in denying Chour's motion to reopen his deportation proceeding?

Statement of Facts

Petitioner Der-Rong Chour is an alien who is a native and citizen of China (AR 129). On February 10, 1974 Chour was admitted to the United States at Baltimore, Maryland as a non-immigrant crewman, authorized to remain a maximum of twenty-nine days (AR 130).[1] At the expiration of his authorized stay Chour failed to depart or to obtain any extension of his authorized stay in this country. (AR 130).[2] Instead Chour absconded and traveled to Great Barrington, Massachusetts where, on July 17, 1974, he was arrested by the Service at his place of unlawful employment (AR 88-9).[3]

Following his apprehension, the Service instituted deportation proceedings against Chour on July 18, 1974 in Boston, Massachusetts by issuing an order to show cause and notice of hearing (AR 88).[4] The order to show

A. Chour's Deportation Hearing.

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[1] Section 252(a) of the Act, 8 U.S.C. § 1282(a).

[2] By failing to leave the United States, Chour remains subject to criminal prosecution under Section 252(c) of the Act, 8 U.S.C. § 1282(c).

[3] As a non-immigrant alien crewman, Section 101(a)(15)(D) of the Act, 8 U.S.C. § 1101(a)(15)(D), Chour was not authorized to obtain employment without the express approval of the Service. 8 C.F.R. § 214.1(c). By violating this restriction in the terms of his entry, Chour was subject to deportation on this basis as well. Section 241(a)(9) of the Act, 8 U.S.C. § 1251(a)(9).

[4] Apparently a prior order to show cause, dated July 17, 1974, had also been issued against Chour but cancelled by the Service pursuant to its authority under 8 C.F.R. § 242.7(a) (AR 88).

cause clearly warned Chour that there would be a deportation hearing in Boston on August 9, 1974 to determine whether he was deportable for overstaying his nonimmigrant visa (AR 88). It also advised Chour of his rights at the deportation hearing, including the right to be represented by counsel at his expense, the right to present evidence or witnesses in his behalf, and the rights to examine the evidence against him and to cross-examine any witnesses presented by the Service.[5]

After it had been personally served (*id.*), the order to show cause was read *and explained* to Chour in his language to insure that he understood both the allegations against him and the nature and purpose of the rights available to him at his deportation hearing (*id.*). Chour then was released from custody, pending his deportation hearing, when the $2500 bond required by the Service[6] was posted by the International Fidelity Insurance Company and guaranteed by Mr. Chang, 601 West 112th Street, New York, New York (AR 89-90, 95; A 17).[7]

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[5] Chour was advised of these rights by the reverse side of the order to show cause issued against him which has been added to the certified administrative record filed in Docket No. 77-4136 pursuant to this Court's order dated September 21, 1977.

[6] Section 242(a) of the Act, 8 U.S.C. § 1252(a), and 8 C.F.R. § 242.2(a) permit the Service to establish such conditions for an alien's release from custody, including the posting of a bond, as it deems appropriate.

[7] References preceded by the letter "A" refer to the appendix filed by Chour in Docket No. 77-2074. As the Court will observe, this appendix contains all of the documents submitted by Chour to Judge Port but does not contain any of the exhibits attached to the Government's opposition to a writ of habeas corpus (A 12) and supplementary answer in opposition to a writ of habeas corpus (A 16). These omissions resulted from Chour's failure to follow the procedures established in Rule 30, Federal Rules of Appellate Procedure. However, for the most part, the omissions are not prejudicial to the respondents since several of these ex-

[Footnote continued on following page]

Upon his release Chour traveled to New York City (AR 128-29). From there he advised the Service of his new address and requested it to reschedule his deportation hearing for the Service's New York office. This request was granted and Chour was notified to report for his hearing on September 4, 1974 (*id.*).[8] Apparently Chour had no trouble receiving this notice because he appeared at the Service's New York office as required (*id.*).

On September 4, 1974 Chour's deportation hearing was held before Immigration Judge Edward P. Emanuel. Prior to the commencement of the hearing the Judge inquired whether Chour understood the interpreter which the Service had provided for his benefit (AR 129). The Judge then asked Chour if he knew that the hearing was a deportation hearing which would determine whether he would be allowed to remain in the United States. Chour replied "Yes." (*id.*).

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hibits are reproduced in the certified administrative record filed in Docket No. 77-4136 (Exhibits 1-10, AR 88-97; Exhibits 11-12, AR 75-9). We do call this Court's attention to Exhibit 13, an affidavit of a Service employee, dated June 24, 1977, that recites the efforts of the International Fidelity Insurance Company to contact Chour and to advise him to surrender for Deportation as ordered, and Exhibit 14, an internal Government memorandum, dated June 22, 1977, that reflects Chour's failure to file alien address cards for the years 1975, 1976 and 1977.

[8] There are no documents before this Court which reflect either Chour's or the Service's actions in the transfer of Chour's deportation hearing to New York. However, the record does show that the Service continually notified Chour at the same address (AR 73, 79, 85, 93, 95), that his address was the same one used by Mr. Chang, the guarantor of Chour's bond (AR 73), that Chour had no difficulties being reached at this address *prior* to his deportation hearing (AR 76), and that Chour's deportation hearing took place on September 4, 1974 in New York with Chour present (AR 128). Consequently, it is reasonable to presume that Chour did notify the Service of his address change as required by law. Section 265 of the Act, 8 U.S.C. § 1305.

Once the Judge was satisfied that Chour understood both the purpose of the hearing and the interpreter present throughout the hearing, he informed him that he had a right to be represented at his own expense (*id.*)[9] Chour, who had previously been informed of this right when he was served with the order to show cause and had elected to appear at the hearing without counsel, did not request counsel and responded, "I will speak for myself." (*id.*).

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[9] It is true. as Chour has noted repeatedly throughout both his administrative proceeding and his federal action, that differing transcripts were prepared concerning this aspect of Chour's hearing. The original, submitted to Judge Port pursuant to his order, dated June 16, 1977 (AR 70), reads:

> "You have a right to have a lawyer or other representative of your own selection without cost to the Government. Moreover, you are not required you are not forced to have such a person. . . ." (AR 129)

The transcript prepared for Chour's attorney (*see* footnote 22, *infra*), reads:

> "You have a right to have a lawyer or other authorized representative of your own selection but without cost to the government. However, you are not required, you are not authorized to have such a person. . ." (AR 108).

As Judge Port concluded, irrespective of which transcript is correct it is apparent from both the Immigration Judge's entire question and Chour's undisputed response, "I will speak for myself," that Chour was aware of his right to obtain counsel that he deliberately elected to proceed without counsel, and that, as a result, no due process deprivation occurred (AR 108, 129). In addition the United States Attorney's office for the Southern District of New ork has had an independent interpreter examine both transcripts and the tape from which they were made to determine not only which transcript was correct but, more importantly, since Chour allegedly speaks little, if any, English, which transcript represents the correct translation of what was actually said to Chour at that hearing. This interpreter has advised that the original transcript supplied to Judge Port is substantially correct in all significant respects. Of course, if this Court requests, the original tape can be provided to the Court so that it can verify the transcript and the translation itself.

The hearing then focused on the allegations contained in the order to show cause (AR 129). With clear unequivocal affirmative answers Chour conceded the truth of all of these allegations. In summary, he admitted that he was not a citizen or national of the United States, that he had been admitted to the United States as a non-immigrant crewman on February 10, 1974, that he had permission to remain for no longer than twenty-nine days and that he had remained longer without permission (AR 129-30).

Once Chour had conceded his deportability, the Judge inquired whether he wished to apply for voluntary departure,[10] the only form of relief from deportation available to him at that time (AR 130).[11] Chour replied affirmatively (*id.*). As a result the Judge granted Chour thirty days in which to depart voluntarily and issued alternative orders of deportation to the Republic

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[10] *See* Section 244(e) of the Act, 8 U.S.C. § 1254(e), and 8 C.F.R. § 244. This relief can be granted where the alien establishes that he is willing and has the immediate means with which to depart promptly from the United States. If granted it removes the stigma of an order of deportation from the alien's record and facilitates any future lawful entry into this country he might wish to make. *See* Section 212(a)(17) of the Act, 8 U.S.C. § 1182(a)(17); *Ballenilla Gonzales* v. *I.N.S.*, 546 F.2d 515, 521 (2d Cir. 1976).

[11] In his administrative proceeding (AR 120) and his federal action (AR 64-65), Chour refers to several factors which he asserts make his deportation unfair. However, regardless of the validity of these contentions (*see* footnotes 18-20 and Point II, *infra*), it is undisputed that none of these factors were in existence when Chour's hearing was held and that, at that time, Chour received the only form of discretionary relief for which he was eligible, voluntary departure. This probably explains the absence of any serious claim by Chour that he was prejudiced by the irregularities at his deportation hearing. *Ballenilla-Gonzales* v. *I.N.S.*, *supra* at 520; *Henriques* v. *I.N.S.*, 465 F.2d 119, 120-21 (2d Cir. 1972), *cert. denied*, 410 U.S. 968 (1973).

of China on Taiwan and Hong Kong in the event Chour failed to depart within the time allotted (AR 133). The Judge's conclusions were then incorporated into a written decision which also reflected Chour's decision to waive his right to appeal to the Board (*id.*). After this decision was served on Chour (*id.*) and read to him by the interpreter, the hearing was closed (AR 132).

B. Chour Fails To Depart Voluntarily and Absconds To Avoid Deportation.

Despite his representations to the Judge, Chour failed to depart voluntarily within the time allotted (AR 92). Nor did he request an extension of his voluntary departure time or submit anything to the Service which might excuse his failure to leave.[12] Consequently, on November 20, 1974, the Service issued a warrant for his deportation pursuant to the alternative order in the Immigration of Judge's decision (*id.*).

On December 2, 1974 the Service notified Chour that a review of his file had revealed no administrative relief from deportation to be available to him and that, as a result, he should prepare to be deported to Taiwan on December 12, 1974 (AR 93). This notice was mailed to Chour at his last known address by certified mail-return receipt requested and was received at that address by Mr. Chang, the guarantor of Chour's departure bond (A 17-18). A similar notice was also sent to the International Fidelity Insurance Company, the obligors on Chour's departure bond (AR 94), which immediately contacted Mr. Chang and advised him to surrender Chour for deportation on December 12, 1974 or risk breaching the bond and forfeiting its value (AR 17-18).

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[12] *See* 8 C.F.R. § 244.2.

Notwithstanding the combined efforts of the Service, the Insurance Company and Mr. Chang, Chour absconded and his custody bond was breached (AR 95). Chour did not surface again until June 6, 1977 when he was apprehended by the Service in Albany, New York (96). During this three year hiatus, Chour, of course, failed to register as an alien in the United States (AR 74) [13] or to advise the Service of his address changes [14] as required by law.

C. Chour's Apprehension In 1977.

On June 6, 1977, during a routine investigation, Chour was apprehended by the Service while working unlawfully as a waiter in a restaurant in Albany, New York (AR 96). Initially Chour asserted that he was a lawful permanent resident but that he had left his alien registration card in his car (*id.*). However, when escorted to his vehicle, Chour abandoned this pretense and instead asserted that he was immune from arrest because he was out on bond from a pending immigration proceeding in New York (*id.*).[15] Unable to verify either story at that time, the Service issued an order to show

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[13] All aliens who remain in the United States for thirty days or longer have to register with the Attorney General. Section 262(a) of the Act, 8 U.S.C. § 1302(a). By failing to register Chour remains subject to criminal penalties under Section 266(a) of the Act, 8 U.S.C. § 1306(a).

[14] All aliens in the United States who must register must also advise the Service of their address each year and of any address changes within ten days of such changes. Section 265 of the Act, 8 U.S.C. § 1305. By failing to comply with these requirements, Chour remains subject to deportation and to criminal prosecution under Section 266(b) of the Act, 8 U.S.C. § 1306(b).

[15] By making these false statements to the Service, Chour became subject to criminal prosecution under 18 U.S.C. § 1001.

cause against Chour and took him into custody (AR 85, 96).

Subsequently the Service discovered the November 20, 1974 warrant of deportation outstanding against Chour (AR 85). As a result it cancelled the order to show cause and immediately made arrangements to effectuate the order of deportation entered nearly three years earlier (AR 97).[16]

D. Chour's Federal Court Action (Docket No. 77-2074).

Faced with imminent deportation and unable to obtain a stay from the Service due to his prior immigration history (AR 67), Chour applied to Judge Edmond Port, United States District Judge for the Northern District of New York, for a writ of habeas corpus on June 10, 1977 although, as the Judge later concluded (AR 40), the Court lacked subject-matter jurisdiction to consider Chour's claims.[17] In his application Chour asserted that

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[16] There is no time limit within which a warrant of deportation must be executed. Section 242(c) of the Act, 8 U.S.C. § 1252(c), and 8 C.F.R. § 243.3(a); *See* also Gordon and Rosenfield, *Immigration Law and Procedure*, Section 5.15(e) (1976).

[17] Section 106(a) of the Act, 8 U.S.C. § 1105a(a), provides that the sole and exclusive method for obtaining judicial review of final orders of deportation, *Foti* v. *I.N.S.*, 375 U.S. 217, 222 (1963), or of denials of motions to reopen, *Giova* v. *Rosenberg*, 379 U.S. 18 (1964), is the petition for review procedure in the Circuit Courts and that this procedure cannot be utilized until the alien has exhausted his administrative remedies. Chour's acquiescence in Judge Port's decision to dismiss the application on jurisdictional grounds as manifested by his failure to dispute the Judge's conclusion in his brief (Chour's brief, pages 7-8, 17), and his attorney's admitted familiarity with the immigration laws (AR 20), suggest that Chour's application was filed solely to acquire a stay of deportation for sufficient time to enable Chour to exhaust his administrative remedies and obtain the automatic statutory stay of deportation that accompanies the filing of a petition for review. *See* Section 106(a)(3) of the Act, 18 U.S.C. § 1105a(a)(3).

the existence of several factors—his acquisition of a labor certification,[18] his ownership of property,[19] his engagement to marry a permanent resident alien,[20] and the pendency of legislation in the Congress to grant amnesty to illegal aliens—combined to make his deportation inequitable and he requested the Court to stay his departure and order his release from custody until it resolved that question (AR 64-68). Chour did not tell the District Court that he had already been the subject of a 1974 deportation proceeding in New York City and that he was currently under a warrant of deportation because he had failed to depart voluntarily and because he had refused to report for deportation (*id.*).

Based on the representations contained in Chour's application, Judge Port issued an order which stayed Chour's deportation until June 29, 1977, when a hearing was scheduled to determine the validity of his contentions

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[18] The acquisition of a labor certificate by an alien with an immigration history like Chour's has never been found to be sufficient cause to withhold deportation. *Au Yi Lau* v. *I.N.S.*, 555 F.2d 1036, 1044 (D.C. Cir. 1977); *United States ex rel. Fen* v. *Esperdy*, 423 F.2d 6, 8-9 (2d Cir. 1970).

[19] The ownership of property can only be relevant to an alien's eligibility to remain permanently in this country if an investor status application has been submitted pursuant to 8 C.F.R. § 212.8(b)(4). *See Heitland* v. *I.N.S.*, 551 F.2d 495, 499-500 (2d Cir. 1977). Since Chour has never submitted such a claim and bases his admissibility to the United States on his skills as a "mechanic" (AR 66, 120), the fact that Chour may have acquired property here during his unlawful stay is clearly inapposite to his claim to continued residence in this country.

[20] Since the *marriage* of an alien to either a United States citizen or a permanent resident confers no right upon the alien to enter or remain in the United States, *Noel* v. *Chapman*, 508 F.2d 1023, 1027-28 (2d Cir.), *cert. denied*, 423 U.S. 824 (1975); *Schwartz* v. *Rogers*, 254 F.2d 338, 339 (D.C. Cir. 1958), *cert. denied*, 357 U.S. 928 (1959), it is apparent that Chour's alleged *engagement* to a permanent resident cannot preclude the Service from effecuating his deportation.

(AR 70). This order also required the Service to produce Chour at that hearing (*id.*), to provide his attorney with copies of the documents relating to his immigration proceeding (AR 71), and to respond to the allegations in Chour's application (*id.*).

On June 20, 1977, the United States Attorney for the Northern District of New York served Chour's attorney with an opposition to the writ of habeas corpus (AR 87). Pursuant to the Court's order, this document set forth the Service's position concerning Chour's contentions (AR 84-88) and contained as exhibits all available documents relating to Chour's immigration proceeding (AR 88-97).[21] Subsequently, on June 24, 1977, additional documents relating to Chour's 1974 deportation proceeding became available, including the transcript of that hearing, and these were also forwarded to Chour's attorney (AR 72-79).[22]

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[21] Unexplainably the reverse side of the order to show cause issued against Chour, which enumerated his rights at his deportation hearing, was omitted from this document. However, since it was clearly adverse to Chour's contentions and since the action was eventually dismissed on jurisdictional grounds (a conclusion which has not been seriously contested in this appeal), this omission did not prejudice Chour.

[22] As discussed above in footnote 9, two differing transcripts of Chour's deportation hearing were prepared by the Service's New York Office. This unusual occurrance resulted from the Service's efforts to provide Chour's attorney with a copy of the transcript prior to the June 29, 1977 hearing before Judge Port. Thus, after the original had been prepared by the Service's New York office and forwarded to the Service's Buffalo office, it failed to arrive in a timely manner. As a result, insufficient time remained to forward a copy to Chour's attorney in New York and the Service instead requested that a second copy be transcribed in New York and delivered directly to Chour's counsel. The rush in preparing this second transcript apparently resulted in its inaccurracies. *See* Affidavit of Sylvia Davis, dated July 1, 1977 and attached to the Government's response to Chour's July 7, 1977 motion to this Court.

On June 29, 1977 a hearing was held before the Honorable Edmond Port, United States District Judge for the Northern District of New York, concerning Chour's application for a writ of habeas corpus (AR 2). Pursuant to the Court's earlier order, Chour was present in the courtroom at that time (AR 3). However, shortly before the hearing began, Chour's attorney presented the Court and the Government with his reply affidavit and memorandum of law which, for the first time, asserted that Chour's 1974 deportation proceeding did not comply with statutory and constitutional due process requirements because, *inter alia*, Chour was not advised of his rights to be represented at that hearing at no expense to the government, to examine the evidence against him and to submit evidence in his own behalf, to cross-examine witnesses, and to appeal any adverse decision to the Board of Immigration Appeals (AR 12). Chour did not indicate what prejudice, if any, he suffered from these alleged irregularities but nevertheless argued that they made the order of deportation entered against him void and the outstanding warrant of deportation unenforceable.

At this time the hearing commenced and focused on the validity of Chour's due process contentions. Initially Judge Port requested Chour to testify with respect to the facts supporting his claims (AR 6). However, Chour's attorney objected and stated that he wished the case to be resolved on the "papers that have been presented . . . thus far . . ." (*id.*).[23] Consequently, Judge Port

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[23] In light of the strong presumption of validity and regularity surrounding administrative action, *TNT Tariff Agents, Inc.* v. *I.C.C.*, 525 F.2d 1089, 1093 (2d Cir. 1975); (AR 35), and Chour's burden to overcome that presumption, *Lewis Dairy, Inc.* v. *Freeman*, 401 F.2d 308, 316 (3d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969); *Crowther* v. *Seaborg*, 312 F. Supp. 1205, 1234 (D.C. Colo. 1970), his failure to testify concerning the alleged irregularities in his deportation proceeding severely undercut his conten-

[Footnote continued on following page]

agreed to make his determination from the record (AR 6-7) and proceeded to hear oral argument.

After the parties had concluded, the hearing was adjourned for an hour to enable Judge Port to examine the record, including the papers recently submitted by Chour's attorney (AR 28-29). When it resumed Judge Port announced his decision to dismiss Chour's action on jurisdictional grounds because Chour's administrative remedies had not been exhausted prior to its institution (AR 37-39) [24] and to deny Chour's application for bail as a result of his immigration history (AR 41-42). The judge also noted that he regarded Chour's contention, that he had not been advised of his right to counsel at his 1974 deportation hearing, as "inconsequential"

> ". . . because taken as a whole [the statement in the deportation hearing] clearly tells [Chour] that he can have a lawyer, has a right to have a lawyer without cost to the government. That he has a right to speak for himself, to act as his own representative and that he had the choice and he exercised a choice by saying 'I will speak for myself' " (AR 33).

On July 7, 1977, after Judge Port extended Chour's stay of deportation for ten days so he could pursue his administrative remedies, Chour filed a notice of appeal from Judge Port's order dismissing his action (Docket No. 77-2074) and a motion requesting this Court to extend his stay of deportation and to order his release from custody pending appeal. On July 19, 1977 Chour's requests were denied by a panel of this Court which concluded that his release from custody was unwarranted

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tions in this regard. *N. Sims Organ & Co.* v. *S.E.C.*, 293 F.2d 78, 80-81 (2d Cir. 1961); *S.E.C.* v. *Kelly Andrew's & Bradley, Inc.* 341 F. Supp. 1201, 1205 (S.D.N.Y. 1972).

[24] *See* footnote 17, *supra.*

and that his application for a stay was moot in light of the statutory stay he enjoyed from the petition for review filed with the Court on July 14, 1977 (Docket No. 77-4136). Thereafter Chour posted a $10,000 bond demanded by the Service and obtained his release from custody pending this appeal.[25]

E. Chour's Administrative Proceeding (Docket No. 77-4136)

Having acquired a temporary stay of deportation from Judge Port based on the representations in his application, Chour immediately proceeded to exhaust his administrative remedies so that, when his federal court action was dismissed, he could file a petition to review his administrative proceeding and thereby obtain the automatic statutory stay of deportation accompanying such an action.[26] On June 20, 1977 Chour moved to reopen his prior deportation proceeding (AR 119-27). In his motion Chour asserted, as he had in his federal court action, that his 1974 deportation hearing was invalid because it did not comply with statutory and constitutional due process requirements, and that he should not be deported because new factors (his labor certification, his engagement to a permanent resident alien, etc.),[27] which had developed after he absconded from his 1974 deportation proceeding, made his current deportation unfair and might permit him to adjust his status to that of a permanent resident (AR 119-20).[28] Chour also requested

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[25] *See* page 2 of Chour's brief.

[26] *See* footnote 17, *supra*.

[27] *See* footnotes 18-20, *supra*.

[28] Section 245(a) of the Act, 8 U.S.C. § 1255(a), precludes alien crewman, like Chour, from obtaining the discretionary relief of adjustment of status. *See* Point II—B, *infra*.

that his motion "be heard speedily" (AR 126) and that he be released on bail during its pendency (AR 120) but again failed to indicate what prejudice, if any, resulted from the alleged irregularities in his deportation hearing.

On June 20, 1977, Chour's motion to reopen was denied by Immigration Judge Gordon W. Sacks (AR 114). In his opinion Judge Sacks noted that he lacked jurisdiction to consider Chour's release from custody [29] and that Chour was ineligible for adjustment of status and concluded that "[t]here has been no showing of lack of due process" (*id.*).

Chour appealed Judge Sack's decision to the Board of Immigration Appeals on June 30, 1977 (AR 98) and requested the Board to stay his deportation, to order his release and to "expedite this entire matter" (AR 99).

The Board denied Chour's requests for a stay and for a release on July 6, 1977 (AR 54). In its opinion the Board stated that it had considered Chour's request but concluded that, since there was "little likelihood" his motion to reopen would be granted, there was no reason to stay his deportation (*id.*).

Again faced with imminent deportation, Chour submitted a motion to this Court on July 7, 1977 in which he asked this Court to grant him the same relief the Board had just denied. Chour's motion was scheduled to be heard on July 19, 1977. In the interim, his deportation was stayed by order of this Court until the merits of his motion could be resolved.

This Court's order temporarily staying Chour's deportation became academic on July 14, 1977 when the Board of Immigration Appeals dismissed Chour's appeal and concluded (AR 45):

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[29] *See* 8 C.F.R. § 242.2(b).

> "Although the respondent was not represented by an attorney at the September 4, 1974 hearing, we are convinced that he effectively waived his right to counsel at the hearing. See *Barthold* v. *I.N.S.*, 517 F.2d 689 (5th Cir. 1975); *Tupacyupanqui-Martin* v. *I.N.S.*, 447 F.2d 603 (7th Cir. 1971). Although the respondent was not then advised of his right to cross-examine witnesses against him as required by the regulations, in view of the fact that the finding of deportability was based upon his own admissions at the hearing and he was granted the only discretionary relief available to him, the error was harmless. We are satisfied that the conduct of the September 4, 1974 hearing was not of such a nature as to vitiate the finding of deportability. See *Mealha* v. *Shaughnessy*, 219 F.2d 600 (2d Cir. 1955)".

With the Board's decision, Chour's administrative remedies were exhausted and he was able to file a petition in this Court to review that decision (Docket No. 77-4136). He has since remained in the United States, free on $10,000 bond, pursuant to the automatic statutory stay of deportation which accompanies a petition for review filed pursuant to Section 106 of the Act, 8 U.S.C. § 1105a.[30]

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[30] *See* footnote 17, *supra*.

ARGUMENT

POINT I

The Protections Accorded Chour In His Deportation Proceeding Satisfied Statutory And Constitutional Due Process Requirements And Resulted In A Fair Hearing.

Cognizant of the severe problems posed by the illegal entry of aliens into this country, the courts have continually and steadfastly affirmed Congress' plenary power to establish procedures for the admission and expulsion of aliens. *Fiallo* v. *Bell*, 45 U.S.L.W. 4402 (U.S. April 26, 1977); *Kliendienst* v. *Mandel*, 408 U.S. 753, 766 (1972); *The Japanese Immigrant Case*, 189 U.S. 86 (1902). The same courts have recognized that such proceedings are civil administrative proceedings, and have rejected requests by permanent resident aliens to extend to deportation hearings the accused's Sixth Amendment guarantees in a criminal trial, including the right to counsel. *Woodby* v. *I.N.S.*, 385 U.S. 276, 285 (1966); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952), *reh. denied*, 343 U.S. 936 (1952); *Bugajewitz* v. *Adams*, 228 U.S. 585 (1913). Instead, the courts have only required that the deportation proceedings established by Congress comply with the requirement of fundamental fairness inherent in the due process clause of the Fifth Amendment, *Wong Sung* v. *McGarth*, 339 U.S. 33 (1950), and have limited their review of these proceedings to an inquiry into whether the deportation hearing at issue was fair. *Ballenilla-Gonzalez* v. *I.N.S.*, *supra* at 520; *Casteneda-Delgado* v. *I.N.S.*, 525 F.2d 1295 (7th Cir. 1975); *Aalund* v. *Marshall*, 461 F.2d 710, 711 (5th Cir. 1972); *Kam Ng* v. *Pulliod*, 279 F.2d 207, 210 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961).

The due process requirements of a fair administrative hearing vary with the loss to be suffered by the in-

dividual [31] and the governmental interest in the proceeding. As a result the Supreme Court has not required administrative hearings to conform to the rigid due process requirements of a criminal trial but has allowed flexibility in the hearings so long as fundamental fairness results. *Wolff* v. *McDonnell*, 418 U.S. 539, 563 (1974); *Gagnon* v. *Scarpelli*, 411 U.S. 778, 78-89 (1973); *Goldberg* v. *Kelly*, 397 U.S. 254, 264-65 (1970); *see* Friendly, "Some Kind of Hearing", U. Pa. L. Rev. 1267 (1975).

Pursuant to Congress' plenary power the Service's procedures are an attempt to accord fundamental fairness to every alien in a manner consistent with the strong national interest in the expeditious deportation of aliens unlawfully in this country. The results, incorporated into the Act at Section 242(b)(1-4), 8 U.S.C. § 1252(b)(1-4), and the regulations at 8 C.F.R. § 242, grant each alien in a deportation proceeding a number of due process rights which insure a fair hearing. While adherence to these procedures is clearly preferable, the fact that some irregularity or error may have been committed does not, by itself, make the hearing unfair or justify judicial intervention to invalidate the proceeding. *Corniel-Rodriguez* v. *I.N.S.*, 532 F.2d 301, 307 n.18 (2d Cir. 1976); *Cheung* v. *I.N.S.*, 418 F.2d 460, 464 (D.C. Cir. 1969); *Pineiro-Lopez* v. *Kennedy*, 293 F.2d 540, 542-43 (D.C. Cir.), *cert. denied*, 368 U.S. 866 (1961); *United States ex rel. Sollazzo* v. *Esperdy*, 187 F. Supp. 753, 755 (S.D. N.Y.), *aff'd*, 385 F.2d 341 (2d Cir.), *cert. denied*, 366 U.S. 905 (1960); *United States ex rel. Dentico* v. *Es-*

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[31] As a non-immigrant crewman, authorized to remain in the United States for no longer than twenty-nine days, Chour could not have expected continued residence in this country and therefore his loss as a consequence of deportation could hardly be either substantial or unforeseen. *See Pilapil* v. *I.N.S.*, 424 F.2d 6, 11 (10th Cir.), *cert. denied*, 409 U.S. 908 (1970).

perdy, 280 F.2d 71, 73 (2d Cir. 1960); *DeSouza* v. *Barber*, 263 F.2d 470, 475-76 (9th Cir. 1959); *Mealha* v. *Shaughnessy*, 219 F.2d 600, 602 (2d Cir. 1955); *Couto* v. *Shaughnessy*, 218 F.2d 758, 760 (2d Cir. 1955).[32] More-

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[32] Chour's reliance on *Castanda-Delgado* v. *I.N.S.*, *supra*, to support his contention that the prejudicial error doctrine is inapplicable to deportation proceedings is misplaced in two respects. First, the aliens in that case had been advised of their right to counsel when the order to show cause was served and when their hearing commenced. As a result the court was not concerned with whether the Service's failure to advise them of their right to counsel constituted harmless error but rather with whether the Immigration Judge's failure to grant a continuance to enable the aliens to obtain counsel constituted an abuse of discretion by depriving the aliens of their rights. In this context the court concluded that the aliens' desire to utilize their right to counsel was "too important and fundamental a right to be circumscribed by a harmless error rule." *Castanada-Delgado* v. *I.N.S.*, *supra* at 1300. Since Chour was advised of his right to counsel on two occasions and made no efforts to either utilize this right or obtain a continuance of his hearing, *Castanada-Delgado* is inapplicable to this case. Second, assuming *arguendo* that the dictum in *Castanada-Delgado* could be applied to this action, this Circuit in *Henriques* v. *I.N.S.*, 121 appears to have adopted a rule of prejudice even in cases involving an alien's statutory right to counsel. As the court stated:

> "No prejudice can be said to have resulted from the absence of counsel. This being true, the hearing below was not invalid."

In fact, in *United States* v. *Daniels*, 558 F.2d 122, 128 (2d Cir. 1977). This Circuit has extended the rule of prejudicial error to include criminal sentencing hearings by concluding that the absence of counsel at such a hearing requires that the sentence be vacated only if the defendant "was prejudiced by the lack of an advocate. . . ."

over, the application of the doctrine of harmless error to deportation proceeding merely reflects the well settled law that procedural irregularities in administrative proceedings must be prejudicial to a party to warrant judicial intervention.[33] *Haltmier* v. *Commodity Futures Trad-*

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[33] In his brief Chour refers to several decisions which, he asserts, support his contention that *any* deviation by an agency from its regulations invalidates the agency's actions irrespective of what prejudice resulted (pages 15-16). An examination of these cases reveals that each actually support the doctrine of prejudicial error since each applied it to arrive at a conclusion. *Acardi* v. *Shaughnessy*, 374 U.S. 260 (1953) (5-4 decision invalidating deportation order where the Service's failure to follow its regulations prevented alien from obtaining a fair and independent decision by the Board of Immigration Appeals on his application for discretionary relief); *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1944) (deportation order invalidated because Service's violation of its regulations resulted in admitting into evidence documents that were "highly prejudicial" to the respondent); *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1970) (*criminal conviction* reversed where defendant's statements, obtained in violation of an agency regulations, were prejudicial to the defendant and referred to by both the Judge and the prosecutor although not actually admitted into evidence); *Smith* v. *Resor*, 406 F.2d 141, 146 (2d Cir. 1969). ("A federal court may properly examine . . . if . . . procedural rights under the applicable statutes and . . . regulations were violated in a manner which caused substantial prejudice . . ."); *Sangamon Valley Television Corporation* v. *United States*, 269 F.2d 221, 224 (D.C. Cir. 1959) (". . . agency action that *substantially and prejudicially* violates the agency's rules cannot stand."); *Yellin* v. *United States*, 374 U.S. 109 (1963) (5-4 decision invalidating contempt of Congress citation from House Committee on UnAmerican Activities where committee's failure to follow its rules prejudiced the defendant and may have resulted in his contemptible conduct). We have not discussed *Hammond* v. *Lenfest*, 398 F.2d 705 (2d Cir.), *vacated on rehearing on other grounds*, 398 F.2d 718 (2d Cir. 1968), becafuse that case involves a challenge to the manner in which the agency arrived at its decision not the manner in which it conducted its hearing, and thus is inapposite to Chour's contentions.

ing Comm., Dkt. No. 76-4169, slip op. 3415, 3423 (2d Cir. May 9, 1977); *Buck* v. *Board of Education of the City of New York*, 553 F.2d 315 (2d Cir. 1977); *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corporation*, 511 F.2d 1352, 1360-61 (6th Cir. 1975); *Arthur Murray Studio of Washington, Inc.* v. *Federal Trade Commission*, 458 F.2d 622, 624 (5th Cir. 1972); *National Labor Relations Board* v. *Selwyn Shoe Manufacturing Corporation*, 428 F.2d 217, 224 (8th Cir. 1970); *R. A. Holman & Co.* v. *S.E.C.*, 336 F.2d 736, 740 (2d Cir. 1965); *Alsbury* v. *United States Postal Service*, 392 F. Supp. 71, 75-6 (C.D. Calif. 1975); *John V. Carr & Son* v. *United States*, 347 F. Supp. 1390, 1397 (Customs Court 1972); *Otero* v. *New York City Housing Authority*, 344 F. Supp. 737, 745 n.13 (S.D.N.Y. 1972). Indeed, this Circuit has even applied the doctrine of harmless error to criminal proceedings as well. *United States* v. *Daniels*, *supra*.

It is this context that Chour's due process contentions must be examined to ascertain if his 1974 deportation hearing was fundamentally fair.

A. Chour received a fair hearing in the absence of counsel, effectively waived his statutory right to retain counsel, and was not prejudiced by his waiver of retained counsel.

An important element in a fair hearing is the opportunity to be represented by counsel. The Courts have sustained Congress' implementation of this element of due process through the requirement that an alien be informed of her statutory right to be represented by a lawyer, and be given the opportunity to obtain one. *Henriques* v. *I.N.S.*, *supra*; *United States ex rel.*

Woldinger v. *Reimer*, 103 F.2d 435, 436 (2d Cir. 1939).[34] Moreover, since deportation proceedings are civil in nature and do not result in confinement, an alien is not entitled to the Sixth Amendment's guarantee of counsel, *Burquez* v. *I.N.S.*, 513 F.2d 751 (10th Cir. 1975); *Martin-Mendoza* v. *I.N.S.*, 499 F.2d 918 (9th Cir.), *cert. denied*, 419 U.S. 1021 (1974), or to the due process clause's guarantee of counsel. *See In re Gault*, 387 U.S. 1 (1967); *Gagnon* v. *Scarpelli*, *supra*. Thus, there is no requirement, either under due process concepts or the Act, that counsel be present in every case. *Ballenilla-Gonzalez* v. *I.N.S.*, *supra; Henriques* v. *I.N.S.*, *supra; Carbonell* v. *I.N.S.*, 460 F.2d 140 (2d Cir. 1972).

The absence of counsel at a hearing will not, by itself, invalidate the hearing where the alien has been properly informed of his right to be represented, has been given a fair opportunity to exercise this right, and has elected to proceed without counsel with no resultant prejudice. Before appointed counsel is required by due process in a specific case, the factual circumstances of that case must reflect the need for appointed counsel to insure a fair hearing, i.e., that a counsel's presence and participation would be meaningful and significant. *Gagnon* v. *Scarpelli*, *supra* at 790; *United States* v. *Daniels*, *supra; Aguilera-Enriques* v. *I.N.S.*, 516 F.2d 565, 568-69 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *Burquez* v. *I.N.S.*, *supra* at 755; *Henriques* v. *I.N.S.*, *supra* at 120-21.

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[34] See Section 242(b)(2) of the Act, 8 U.S.C. § 1252(b)(2). This requirement has been enforced strictly in the Third Circuit, *Cholmos* v. *I.N.S.*, 516 F.2d 310 (3d Cir. 1975), and in the Seventh Circuit, *Castaneda-Delgado* v. *I.N.S.*, *supra*, while this Circuit apparently has adopted the doctrine of prejudicial error. *Henriques* v. *I.N.S.*, *supra*.

The presence of counsel at Chour's deportation hearing would not have affected the outcome. Chour has engaged counsel for his appeal to the Board of Immigration Appeals and his appeals to this Court. This counsel has asserted that Chour was prejudiced by the absence of counsel in two respects. First he asserts that counsel would have developed a defense to the charges against Chour or could have supplemented the record with mitigating circumstances which might have influenced the Immigration Judges' decision. However, neither of these contentions is supportable. The sole issue before the Immigration Judge was whether Chour had overstayed his twenty-nine day visa. *Henriques* v. *I.N.S.*, *supra* at 120. Throughout Chour's various administrative and federal court proceedings his attorney has failed to refer to any evidence which might indicate that Chour had authority to remain in the United States after his visa expired.[35] Consequently it is undisputed that he overstayed his visa and is deportable as charged in the original order to show cause.[36] Moreover, in this regard, the presence of mitigating circumstances, no matter how compelling, would have been completely irrelevant to this determination. *Ballenilla Gongalez* v. *I.N.S.*, *supra* at 520; *Henriques* v. *I.N.S.*, *supra*.

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[35] Clearly Chour's total failure of proof in this regard cannot be excused by his contention that, without examining his administrative file, he was unable to know whether he had any justification for his failure to depart pursuant to the terms of his limited visa (Chour's brief, page 19). The certified administrative record has been filed with this Court and does not contain any basis to vitiate Chour's failure to comply with his visa. Moreover, Chour has been represented by experienced counsel throughout this proceeding as well as his administrative proceeding. Presumably, if any defense to deportability existed, it would have surfaced during this time.

[36] As a result of his criminal conduct since he absconded in 1974, *see* footnotes 3, 12-13, *supra*, today Chour is deportable on other grounds as well.

Chour's attorney also asserts that Chour was prejudiced by the absence of counsel at his deportation hearing because counsel might have been able to discover statements made by Chour as a result of an unlawful arrest or illegal search which could have been suppressed. However, the only evidence against Chour at his deportation hearing was his admission to the allegations in the order to show cause (AR 129).[37] In this context the presence of counsel at the hearing would have been irrelevant to the result. As this Court recently stated in *Katris* v. *I.N.S.*, Dkt. No. 77-4072 (2d Cir., Sept. 7, 1977) (*Per Curiam*), where a similar contention was made and the only evidence against Katris was his testimony;

> "Although Katris seeks 'Suppression', there is no evidence to suppress. No statements were made, and no evidence was seized at or after the time of arrest. None was introduced at the deportation hearing." *Katris* v. *I.N.S.*, *supra* slip op. at 5798; *Avila-Gallegos* v. *I.N.S.*, 525 F.2d 666 (2d Cir. 1975).

Moreover, since Chour obtained the only form of discretionary relief available, voluntary departure, counsel, even if present, could not have obtained any other result at the hearing.[38] *Ballenilla-Gonzales* v. *I.N.S.*, *supra*; *Henriques* v. *I.N.S.*, *supra*.

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[37] 8 C.F.R. § 242.16(b) requires the Immigration Judge to ask the respondent whether he admits the factual allegations in the order to show cause and the charge of deportability resulting from those allegations. This Court has uniformly upheld deportation orders based upon admissions obtained through this procedure. *Ballenilla- Gonzales* v. *I.N.S.*, *supra* at 519-20; *Henriques* v. *I.N.S.*, *supra* at 120.

[38] It is undisputed that Chour was ineligible for any other form of discretionary relief from deportation at this time. All of the "equities" in his immigration record arose after, and as a result of, his failure to depart pursuant to the order of deportation entered against him at his 1974 deportation hearing. *See* Point II, *infra*. Consequently, the absence of an attorney at the hearing was irrelevant in this regard as well.

In addition, Chour was clearly informed of his right to retain counsel at no expense to the Government and was given the opportunity to engage such counsel, but effectively waived this right. Section 242(b)(2) of the Act, 8 U.S.C. § 1252(b)(2), requires the Service to notify aliens subject to deportation proceedings that they have

> "the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceeding, as he shall choose;"

In this case Chour was afforded this statutory right when the order to show cause was served on him. The reverse side of this order advised Chour;

> "If you choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service." [39]

Moreover, this right was read *and explained* to Chour in his language when it was served.[40] As a result it is clear that Chour was fully advised of his statutory right to counsel and that his contentions to the contrary are without merit.

In addition to the statutory right to retain counsel, an alien subject to deportation proceedings also has a right, set forth in the regulations at 8 C.F.R. § 242.16 (a), to be advised again *in his deportation hearing* that he has the right to representation, at no expense to the Government, by counsel of his choice. However, this right, as well as the alien's statutory right to counsel, can be waived when an alien, fully aware of his right to counsel, chooses to proceed without counsel. *Ballenilla-*

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[39] *See* footnote 5, *supra.*

[40] *See* footnotes 9 and 22, *supra.*

Gonzzalez v. *I.N.S., supra; Burquez* v. *I.N.S., supra; United States ex rel. Dentico* v. *Esperdy, supra.* The waiver must be made intelligently and voluntarily, with a full understanding of the right waived. *Ballenilla-Gonzalez* v. *I.N.S., supra; Burquez* v. *I.N.S., supra.*

The record before this Court demonstrates that Chour effectively waived his right to counsel. He was advised on two separate occasions over a month apart that he had the right to retain an attorney. While Chour challenges the effectiveness of the second warning set forth in the differing transcripts of his hearing, the validity of the first warning is unassailable. Moreover, Chour's response to the second warning, "I will speak for myself," clearly indicates, as Judge Port noted (AR 33), that he was aware of his right to retain counsel, that he understood the Immigration Judge's warning, and that he made a deliberate and conscious decision to proceed with his hearing without representation. In this context, Chour's waiver of counsel was an intelligent and voluntary one which precludes any claims to the contrary. he now presents.[41]

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[41] Compare the hearing transcript in this record with that in *Burquez* v. *I.N.S., supra* at 752. In *Burquez* a permanent resident alien sought review of a deportation order on the ground that he had been denied due process at his deportation hearing by absence of counsel. However, the Court of Appeals rejected the petitioner's contention and held that he had waived his right to counsel based on the following colloquy at his hearing:

> The Trial Judge: At this hearing you have a right to be represented by an attorney by any person authorized to practice in these proceedings. Do you understand?
>
> A. Yes.
>
> Q. Have you retained anyone to represent you for this hearing?

[Footnote continued on following page]

Finally, even if Chour's waiver of counsel had not been voluntary, this would not have been such a flaw in the hearing that it would have to be remanded. The sole issue at the hearing, so far as deportability was concerned, was whether Chour had overstayed his authorized stay. It raised no complex issue of law or fact which would have made an attorney's presence useful. No witnesses were called, or could have been called, for there was no evidence which could have altered the result. While Chour contends there were mitigating circumstances which might have justified his overstay, it is clear that these circumstances might only be relevant to his application for discretionary relief, which was granted. The absence of counsel did not prejudice Chour's case as all of the relevant facts concerning deportation were presented to the Immigration Judge. In similar circumstances the courts have consistently held that such a hearing without counsel does not offend due process. *Casteneda-Delgado* v. *I.N.S., supra; Aguilera-Enriquez* v. *I.N.S., supra, Dunn-Marin* v. *District Director,* 426 F.2d 894 (9th Cir. 1970); *Barthold* v. *I.N.S., supra; Strantzalis* v. *I.N.S.*, 465 F.2d 1016 (3d Cir. 1972); *Tuparyupanqui-Marin* v. *I.N.S., supra; United States* v. *Gasca-Kraft,* 522 F.2d 149 (9th Cir. 1975); *Villanueva-Jurado* v. *I.N.S.*, 482 F.2d 886 (5th Cir. 1973); *Rosales-Cabellero* v. *I.N.S.*, 472 F.2d 1158 (5th Cir. 1973); *Martin-Mendoza* v *I.N.S., supra.*

A. No.

Q. Are you willing to proceed with your hearing without an attorney and to speak for yourself?

A. I guess I am.

Q. Does that mean you do not wish to have an attorney?

A. I see no reason to. I can speak for myself.

B. Chour's deportation proceeding complied with due process requirements and the irregularities which occurred at the hearing were not prejudicial.

In addition to the right to retain counsel, an alien subject to deportation proceedings must also be advised that he has the right to

> ". . . have a reasonable opportunity to examine the evidence against him to present evidence in his own behalf, and to cross-examine witnesses presented by the Government;" Section 242(b)(3) of the Act, 8 U.S.C. § 1252(b)(3).

Chour claims that he was not advised of these statutory rights during his deportation proceeding. However, the record in this appeal belies his contention. The reverse side of the order to show cause states:

> "You should bring with you any affidavits or other documents which you have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.
>
> At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charges set forth therein. You will have an opportuntiy to present evidence on your own behalf, to the receipt of evidence and to cross-examine any witnesses presented by the Government."

These statutory rights were read and explained to Chour in his language when the order to show cause was served.

He has never denied this occurred or claimed that he did not understand the rights that were read to him.[42] Consequently his claims that he was denied his statutory due process rights are unsustainable.

In addition to his statutory claims Chour also asserts that he was deprived of due process rights required by the administrative regulations. He asserts that the regulations require that he should have been advised at his hearing of his rights to examine the evidence against him, to present evidence in his behalf and to cross-examine witnesses against him [43] and that the Immigration Judge's failure to comply with these regulations invalidates the hearing and warrants a remand of his proceeding. While it must be conceded that the transcript of Chour's hearing does not reflect compliance with the regulations, an examination of this irregularity reveals the quintessence of harmless error.

As we discussed, while Chour was not advised of certain rights *at his deportation hearing*, it is undisputed that he was advised of his statutory rights to cross-examine witnesses, to examine the evidence against him and to present evidence in his behalf, over a month prior to that hearing and that these rights were explained to him in his language at that time. Thus, when he arrived at the deportation hearing, Chour was aware not only of the nature of the proceeding but also of his rights at the hearing.

In addition, in the context of Chour's hearing, the Immigration Judge's failure to advise Chour of certain rights he had under the regulations was clearly not prej-

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[42] Throughout his most recent administrative proceeding and his federal court action, Chour failed to submit an affidavit or testify concerning his claims and instead elected to base his contentions "on the record" (AR 6). *See* footnote 23, *supra*.

[43] 8 C.F.R. § 242.16(a).

udicial. Chour's right to cross-examine witnesses was meaningless because, other than himself, no witness testified at his hearing. Similarly, his right to examine the evidence against him could not have assisted his case due to the simple issue involved and the fact that the only evidence introduced were his admissions to the allegations in the order to show cause. Finally, the Immigration Judge's failure to advise him at the hearing of his right to present evidence was also not prejudicial since Chour obtained the only form of discretionary relief available.

The complete absence of prejudice from the irregularities at Chour's hearing is highlighted by his total failure, although assisted by counsel, to suggest what prejudice might have occurred. Thus, despite his assertion that the irregularities at the hearing were not harmless, the only bases of prejudice suggested by Chour are either irrelevant to the issue presented at a deportation hearing, *Ballenilla-Gonzalez* v. *I.N.S.*, *supra* (mitigating circumstances irrelevant); *Katris* v. *I.N.S.*, *supra* (possible suppression claim irrelevant where charges admitted), or have been unsupported by any evidence whatsoever throughout Chour's administrative and federal court proceedings (claim to a defense to deportation). Consequently the conclusion is apparent that the irregularities at Chour's deportation hearing resulted in no prejudice and that, as a result, the Board's decision was correct and should be affirmed.

POINT II

The Board Of Immigration Appeals Did Not Abuse Its Discretionary Authority In Declining To Reopen Chour's Deportation Proceeding To Permit Him To Apply For Discretionary Relief.

A. The reopening of a deportation proceeding is a matter of discretion.

The Immigration and Nationality Act contains no specific provision for the reopening of a deportation proceeding. The Attorney General, under his broad grant of authority to administer and enforce the Act,[44] has promulgated regulations which permit reopening as a matter of discretion provided certain criteria are met. The applicable regulation, 8 C.F.R. § 242.22, provides in pertinent part that motions to open "will not be granted unless the Special Inquiry Officer [Immigration Judge] is satisfied that the evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing." Additionally 8 C.F.R. 103.5 provides that "motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits and other evidentiary material." *See also* 8 C.F.R. §§ 3.2 and 3.8.

Clearly, the regulations contemplate that a motion to reopen contain an offer of evidence, that the evidence be heretofore unobtainable, and that the evidence be sufficient to warrant the grant of the relief sought. Accordingly, the Immigration Judge and then the Board is required to evaluate any such offer of evidence against the background of the record already compiled in the alien's case. Where such evidence, even if accepted as true, would not justify a grant of the ultimate relief sought,

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[44] Section 103(a) of the Act, 8 U.S.C. § 1103(a).

it is obvious that no purpose would be served by reopening the proceeding. *See Greene County Planning Board* v. *FPC*, Dkt. Nos. 76-4151, 4153, slip op. 815, 823 (2d Cir., Dec. 8, 1976), *rev'd on other grounds*, slip op. 4553 (2d Cir., June 30, 1977) (*en banc*).

Similarly, where the evidence offered has come into existence solely as a result of the alien's "artful dodging", *see Hibbert* v. *I.N.S.*, 554 F.2d 17, 21 (2d Cir. 1977), courts have refused to overturn Board decisions denying motions to reopen on that basis alone. *Au Yi Lau* v. *I.N.S.*, *supra*. With these principles in mind we now turn to examine the nature of the relief sought in Chour's motion to reopen and the evidence submitted to support that motion.

B. Chour, an alien crewman, is ineligible for adjustment of status.

Chour's motion to reopen his deportation proceeding initially requested the Service to reopen Chour's hearing because new factors existed which now enabled him to apply for adjustment of status under Section 245 of the Act, 8 U.S.C. § 1255(a) (AR 120). Section 245 provides:

> "The status of an alien, *other than an alien crewman*, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjust, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved." (Emphasis added.)

As is apparent from the Act, Chour, an alien crewman, is statutorily ineligible to obtain adjustment of status relief. *Luen Kwan Fu* v. *I.N.S.*, 431 F.2d 73, 76 (2d Cir. 1970). Moreover, no factors, no matter how new or compelling, can alter this statutory proscription. Consequently the Board's decision denying this aspect of Chour's motion to reopen was clearly correct since no purpose would be served by reopening his hearing to permit him to apply for this relief. *LaFranca* v. *I.N.S.*, 433 F.2d 992, 993 (2d Cir. 1970).[45]

C. The new factors offered to support Chour's motion to reopen did not warrant reopening.

In addition to his request for adjustment of status relief, Chour's motion to reopen also recited other factors —his engagement to a permanent resident, his labor certification as a mechanic, his property in the United States—which, he asserted, warranted a reopening of his deportation proceeding (AR 117).[46] While the exact purpose for the reopened hearing was not articulated, the only form of administrative relief from deportation for which Chour was eligible at that time, as in 1974, was voluntary departure, a privilege he had abused once before. Apparently Chour's motion sought reinstatement of his voluntary departure status, as well as a lengthy extension of his departure date, based on the new "equities" he had acquired in his record since his 1974 hearing. An examination of these "equities" and the manner in which they were acquired will demonstrate the propriety of the Board's conclusion to deny Chour's motion.

The mere acquisition of a valid labor certification, without more, has never been sufficient basis to justify

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[45] *See* footnote 28, *supra*.

[46] *See* footnotes 18-20, *supra*.

a reversal of the Service's decision to deny discretionary relief. *Au Yi Lau* v. *I.N.S., supra; United States ex rel. Fen* v. *Esperdy, supra.* As the court in *Au Yi Lau* commented:

> "The only change in circumstances which petitioners have advanced to us as warranting reopening was the acquisition of 'sixth preference' status. Inasmuch as 'sixth preference' status only signifies approval of the recipient's qualifications to perform specified skilled or unskilled labor, and is only the first step in obtaining an immigrant visa, . . . we fail to see how approval for such status materially relates to the requirements for voluntary departure—good moral character and the willingness and means to depart promptly from the United States . . . As Board Member Torrington's concurring opinion so aptly observed,
>
> > 'The fact that these crewmen have, for so long, stayed in this country illegally, appear to have worked here illegally, and have managed to become beneficiaries of sixth-preference petitions, is not a ground for reopening of the proceedings to give [them] an opportunity to apply for voluntray departure.'" *Au Yi Lau* v. *I.N.S., supra* at 1044.

The reasonableness of the Board's conclusion is also clear where, as in this case, the alien has acquired his labor certificate in one trade (mechanics) but has been apprehended working in another (cook) and where the skills necessary to obtain the certificate have been achieved, if at all, during a period of residence in this country when the alien was a fugitive. *Au Yi Lau* v. *I.N.S., supra; United States ex rel. Fen* v. *Esperdy, supra.*

Similarly, the Board's conclusion to deny Chour's motion despite his alleged *engagement* to a lawful permanent

resident cannot be an abuse of discretion when courts have affirmed Service decisions to enforce deportation orders against aliens *married* to United States citizens or lawful permanen. . 'ent. *Hibbert* v. *I.N.S.*, *supra*; *Noel* v. *Chapman*, *supra*; *Silverman* v. *Rodgers*, 437 F.2d 102 (1st Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); *Armstrong* v. *I.N.S.*, 445) 2d 1395, 1396 (9th Cir. 1971). Moreover, this Service policy reflects Congress' intent, as set forth in Section 214(d) of the Act, 8 U.S.C. § 1184 (d), that only the intended spouses of United States citizens obtain any benefit at all from their marriages. Consequently the Board's decision also effecuates Congress' purpose in Section 214(d) by limiting the hardships to United States citizens while not providing a convenient tool for illegal aliens, like Chour, to frustrate valid orders of deportation by fraudulent marriages made "on the way to the deportation dock." *See Persaud* v. *I.N.S.*, 551 F.2d 776, 780 (3d Cir. 1976) (Stern, J. concurring).

Finally, the fact that Court may have acquired property during his extended unlawful residence in this country cannot make the Board's decision to deny his motion unreasonable. Congress, through the Service, has delineated the limited circumstances in which property can affect an alien's immigration status in 8 C.F.R. § 212.8(b)(4), *Heitland* v. *I.N.S.*, *supra*. In summary, this provision permits intended immigrants an exemption from the labor certification requirement in the Act if they have a sufficiently large investment in a domestic business to create opportunities for United States citizens or permanent resident aliens. However, Chour apparently already has a labor certification and has not indicated any desire or ability to take advantage of this regulation's provisions. Consequently, the Board' decision to deny his motion to reopen was correct.

Assuming *arguendo* the compelling nature of the new "equities" in Chour's immigration record, another inde-

pendent basis exists to support the propriety of the Board's decision to deny Chour's motion to reopen. Each of the factors to which Chour refers arose solely from his deliberate decision in 1974 to ignore both his promise to the Judge to depart voluntarily and the outstanding order of deportation entered against him as a result. Each was nurtured by Chour's failure to comply with the registration requirements of the Act and ability to remain undetected. In this context the Board's decision to deny Chour's motion was proper. *Hibbert* v. *I.N.S.*, *supra; United States ex rel. Fen* v. *Esperdy, supra.* As this Court stated in *Hibbert:*

> "One who fits within the statutory definition of bad moral character does not transform himself into a paragon of virture by five years of artful dodging. We will not allow the immigration laws to be manipulated in this way . . ." *Hibbert* v. *I.N.S., supra* at 21.

D. Scope of Review.

The only issue presented in this Court's review of Chour's motion to reopen is whether or not the Board abused its discretionary authority in denying the motion. As we have indicated, the grant or denial of a motion to reopen is discretionary. *Novinc* v. *I.N.S.*, 371 F.2d 272 (7th Cir. 1967). The scope of judicial review is extremely narrow. *Muskardin* v. *I.N.S.*, 415 F.2d 865 (2d Cir. 1969); *Zupicich* v. *Esperdy*, 319 F.2d 773 (2d Cir. 1963). Where, as here, the facts asserted by Chour would not result in a grant of the relief sought, the denial of such a motion is not an abuse of discretion. *Cheng Kai Fu* v. *I.N.S., supra.*

CONCLUSION

The petition for review should be dismissed and the decision of the District Court should be affirmed.

Dated: New York, New York
October 3, 1977

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State of New York)
County of New York) ss

Robert S. Groban, Jr. being duly sworn, deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 3rd day of October 1977 he served two copies of the within brief

by placing the same in a properly postpaid franked envelope addressed:

Law Offices of David C. Buxbaum, P.C.
11 Broadway
Suite 1612
New York, New York 10004

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Robert S. Groban

Sworn to before me this

3rd day of October, 1977

Pauline P. Troia

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